BEFORE ARBITRATOR MICHAEL ANTHONY MARR

STATE OF HAWAII

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| In the Matter of the Arbitration Between | ) | GRIEVANCE OF ANDREW DUHAYLONSOD Unit 1, Section 16 MR/99/32 |
| UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, | ) | DECISION AND AWARD |
| Union, | ) | HEARING DATES: April 26, 2001 and December 12, 13 and 18, 2002 |
| and | ) | |
| STATE OF HAWAII, DEPARTMENT OF EDUCATION, OPERATIONS AND MAINTENANCE SECTION, LEEWARD/CENTRAL MOWING CREW, | ) | |
| Employer. | ) | |

DECISION AND AWARD

MICHAEL ANTHONY MARR
Attorney, Arbitrator, & Mediator
111 North King Street
Suite # 314
Honolulu, Hawaii 96817
Telephone: (808) 599-5258
Facsimile: (808) 599-1545
E-mail: MmarrADR@aol.com

BEFORE ARBITRATOR MICHAEL ANTHONY MARR, ESQ.

STATE OF HAWAII

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| In the Matter of the Arbitration Between | ) | GRIEVANCE OF ANDREW DUYAYLONSOND |
| UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, | ) | DECISION AND AWARD; CERTIFICATE OF SERVICE |
| Union, | ) | |
| and | ) | HEARING DATES: April 26, 2001 and December 12, 13, and 18, 2002 |
| STATE OF HAWAII, DEPARTMENT OF EDUCATION, OPERATIONS AND MAINTENANCE SECTION, LEEWARD/CENTRAL MOWING CREW, | ) | |
| Employer. | ) | |

## DECISION AND AWARD

The above-referenced matter came on for hearing before this Arbitrator (after his mutual selection by the parties) on April 26, 2001 and December 12, 13, and 18, 2002. (See transcript of proceedings, hereinafter sometimes referred to "Tr."). Both parties were zealously and competently represented by counsel at the arbitration hearing. The United Public Workers, AFSCME, Local 646, AFL-CIO, (hereinafter sometimes referred to as AUnion@) and Andrew Duhaylonsod (hereinafter sometimes referred to as "Grievant") were represented by DAVID M. HAGINO, Esq. The State of Hawaii, Department of Education, Operations and Maintenance Section, Leeward/Central Mowing Crew (hereinafter

sometimes referred to as AEmployer@), was represented by Deputy Attorney General WENDY MATSUMOTO CHUN. Testimony from nine (9) witnesses was received at the arbitration hearing. The Union introduced thirty-two (32) exhibits into evidence and the Employer introduced fifteen (15) exhibits into evidence. In addition, the parties introduced a total of nine (9) joint exhibits into evidence. All of the exhibits were accepted into evidence. Full opportunity was given to the parties to present evidence, examine and cross-examine witnesses and to present oral argument. The parties agreed that their closing briefs would be due on or before July 8, 2003. They also agreed that this Arbitrator's decision would be due on or before August 22, 2003.

This Arbitrator has reviewed the testimony and evidence presented during the hearing on this matter as well as reviewed the well-written and convincing briefs submitted by counsel for the respective parties. This Arbitrator does not feel compelled to address all of the numerous arguments and issues raised by these zealous advocates. This is not to be interpreted that this Arbitrator has not read and reread the transcripts, briefs, numerous pages of exhibits and carefully considered all arguments of counsel. Rather, this Arbitrator has elected to address only those facts and issues that are relevant to his decision. This Arbitrator, as a general rule, will not comment on mattes that he believes are irrelevant, superfluous, redundant, or rendered moot by his decision.

## I. CONCISE STATEMENT OF EMPLOYER=S POSITION.

The Employer maintains that is has not violated by Collective Bargaining Agreement (hereinafter sometimes referred to as "CBA") by failing to continue efforts to devise tests and/or examinations that directly relate to the skills, abilities, and qualifications for the position of tractor operator. The Employer also argues that the Union is equitably

estopped from challenging the test (hereinafter sometimes referred to as the "Examination Instrument") as being unrelated to the skills, abilities and qualifications for the position of tractor operator. The Employer also maintains that it was not prejudiced or biased against the Grievant. Lastly, the Employer contends that it did not violate the CBA by failing to promote the Grievant since the Grievant, although senior to the Selectee, did not possess qualifications that were relative equal to those of the Selectee.

## II. CONCISE STATEMENT OF UNION=S POSITION.

The Union asserts that the Employer has failed to continue to devise tests and/or examinations that relate to the skills, abilities, and qualifications for the position of tractor operator. The Union also maintains that the Examination Instrument used to evaluate the Grievant and the Selectee is invalid because it does not relate to the skills, abilities, and qualifications required for the position of tractor operator. The Union further maintains that the test results are invalid since two of the panel members who administered the Examination Instrument were biased and prejudiced against the Grievant. Lastly, the Union alleges that since the qualifications of the Grievant and the Selectee are relatively equal and the Grievant is senior to the Selectee, the Grievant is entitled to the promotion that the Selectee was awarded.

## III. STIPULATED ISSUES.

At the pre-arbitration conference held on April 18, 2001, the parties agreed and stipulated to several matters. These matters were memorialized in this Arbitrator's letter to the parties on April 18, 2001. The letter and its contents were acknowledged by the parties on the first day of the arbitration hearing held on April 26, 2001. The letter provides in relevant part:

1. Prior steps to the grievance process have been met or waived.

2. The issues set forth below are arbitrable before this Arbitrator.

3. The tow primary issues to be resolved at this arbitration hearing are whether the Employer violated sections 16.06c and 16.07 of the Unit 1 Collective Bargaining Agreement, and if so, what is the appropriate remedy?

4. There are no other issues other than those listed in 3 above.

5. The Grievant shall have the burden of proof concerning the above-Referenced issues.

## IV. RELEVANT CONTRACT (CBA) PROVISIONS.

16.06c SELECTION

When the qualifications between the qualified applicants are relatively equal, the Employer shall use the following order of priority to determine which applicant will receive the promotion:

16.06c.1 The qualified applicant with the greatest length of Baseyard/Workplace or Institutional/Workplace Seniority in the Baseyard/Workplace or Institutional/Workplace where the vacancy exists.

16.07 The Employer shall continue its efforts to devise tests and/or examinations that directly relate to the skills, abilities, and qualifications actually required for the class.

## V. BACKGROUND.

In the summer of 1999 the Employer announced a vacancy for the position of tractor operator (Employer's Exhibit 5). The Grievant as well as 4 other individuals applied for this position. An oral examination was administered to each of the applicants. The Grievant received the second highest score of 128 points out of a possible 216 points for a score of 59%. The Selectee received the highest score of 180 points out of a possible 216 points for a score of 83%. Primarily as a result of the

difference in the test scores, the Selectee was promoted to the position of tractor operator rather than the Grievant.

On September 16, 1999 the Grievant sent the Employer a letter requesting a reason for not being named as the selectee for the position of tractor operator. On September 22, 1999 the Employer, by letter from Mr. Bert K. Yamamoto, Administrator of the Operations and Maintenance Section, responded by informing the Grievant that he was not selected because he did not receive the highest score. Mr. Yamamoto encouraged the Grievant to apply for other vacancies that occur. (Joint Exhibit 4).

On October 12, 1999 Union Representative Mel Rodrigues filed a Step 1 Grievance on behalf of the Grievant, alleging a violation of Sections 16.06C and 16.07 of the CBA (Joint Exhibit 5) for failing to select the Grievant for the position of tractor operator. Mr. Albert S. Yoshii, the Employer's Superintendent Designated Representative, by letter to Mr. Rodrigues dated April 20, 2000, denied the Step 1 Grievance. (Joint Exhibit 6). Mr. Yoshii referred to past arbitration decisions that indicated that since a difference of 5% or less deemed applicants to be relatively equal and since the Grievant scored 59% and the Selectee scored 83%, the Grievant and the Selectee were not relatively equal and the seniority provision of the CBA did become a critical factor. In addition, Mr. Yoshii concluded his letter by stating that he could find no evidence that the Employer failed to devise tests and/or examinations that directly related to the skills, abilities and qualifications necessary for the position of tractor operator.

On April 26, 2000 Union Representative Mel Rodrigues filed a Step 2

Grievance appeal letter on behalf of Grievant, asserting that the Step 1 Decision was unsatisfactory because it failed to resolve the grievance. (Joint Exhibit 7). Mr. Davis K. Yogi, the Employer's Director, by letter to Mr. Mel Rodrigues, dated January 2, 2001 denied the Step 2 Grievance appeal, finding that there were no violations of Sections 16.06c and 16.07 of the CBA since his investigation indicated that the Selectee's score and the Grievant's score were not relatively equal, that the seniority provision did not apply, and that the Examination Instrument used in the selection process properly evaluated each applicant's knowledge, skills, and abilities for the position of tractor operator. (Joint Exhibit 8). On January 1, 2001 Mr. Rodrigues sent notice to Mr. Yogi informing the Employer that the Union was submitting the grievance to arbitration to be determined by the mutually selected undersigned Arbitrator. (Joint Exhibit 9).

## VI. CONCISE DESCRIPTION OF TRACTOR OPERATOR POSITION.

The incumbent must be able to provide lawn-mowing services on school grounds where it is feasible to use the tractor mover and 7-gang mower. The incumbent must have a valid driver's license and possess knowledge and ability to operate, maintain, and provide minor repairs to equipment such as a power or tractor mower. The incumbent must also have at least one year or work experience in these areas. (Employer Exhibits 1, 2 and 5).

## VII. Burden and Standard of Proof.

The initial burden of proof in non-disciplinary proceedings is placed upon the grieving party to present sufficient evidence to prove its assertion. Fairweather Practice and Procedure in Labor Arbitration, page 271 (Fourth Edition). Where the collective bargaining agreement provides that the employee with the most seniority will

prevail when two employees are relatively equal in a competition process, [1] arbitrators in Hawaii have held that the "arbitrary and capricious" standard is to be followed. See State of Hawaii, Department of Health v. Hawaii Government Employees Association, (Grievance of Cynthia Kawada) (Tsukiyama, 1986); State of Hawaii, Department of Industrial Relations v. Hawaii Government Employees Association, (Grievance of John R. Stein) (Yamasaki, 1990); United Public Workers v. State of Hawaii, Department of Health, Hawaii State Hospital, (Grievance of William Rojas) (Ling, 1993); United Public Workers v. County of Kauai, Department of Water Supply, (Grievance of James Silva, Jr.) (Ikeda, 1994); Hawaii Government Employees Association v. Harbors Division Department of Transportation, State of Hawaii, (Grievance of Randal H. W. Leong) (Kennedy, 2000). Also see Mountain States Tel. & Tel. Co., 77 LA 1229 (Hogler, 1981); Super IGA, 74 LA 1218 (Nolan, 1980); Lockheed Ga. Co., 64-2 ARB 64-2 ARB ' 8631 (Flannagan, 1964); Christy Valut Co., 42 LA 1093 (Koven, 1964); Kopper Co., 63-1 ARB ' 8376 (Hebert, 1963). See also: Elkouri and Elkouri, How Arbitration Works (5th Edition), page 843 (...such clauses have been construed to place a relatively light limitation upon the employer and, in effect, to place the burden of proof on the employee). Under this approach, when the Union challenges management=s determination it must sustain the burden of proving discrimination, capriciousness, arbitrariness, or bad faith on the part of the employer or proving that the employer=s

[1] Initially, is deemed essential to identify and to characterize what type of seniority clause is provided for by the language of a collective bargaining agreement. Seniority rights are created by and depend wholly upon the contract between the parties. Basically, there are at least four (4) distinct types of seniority rights. (1) "Strict seniority" is the strongest type of seniority clause which give preference to the employee with the longest service without regard to qualifications, ability or other considerations. (2) A "sufficient ability" clause give preference to the senior qualified bidder, provided he is qualified or has the necessary ability to perform the job. (3) A "hybrid" seniority clause requires consideration of both seniority and ability. (4) The "relative ability" seniority clause provides that seniority shall govern if the comparative ability or qualifications of the applicants are "relatively equal" or substantially equal" or where "no material difference" in the qualification s of the applicants exists. The "relative ability clause" used in the CBA before this Arbitrator is the weakest of the 4 seniority clauses

evaluation of abilities was clearly wrong. Id., also see cases cited at Footnote 176.

Still, Hawaii Arbitrators have consistently held that tests used in determining ability must be (1) specifically related to the requirements of the job, (2) fair and reasonable, (3) administered in good faith and without discrimination, and (4) be properly evaluated. These requirements are supported by the State of Hawaii Supreme Court in University of Hawaii Professional Assembly on Behalf of Daeufer v. University of Hawaii, 659 P.2d 720, 66 Haw. 214 (1983). Also see United Public Workers v. Department of Public Works, County of Maui, (Grievance of Robert Fuller) (Uysato, 1993); United Public Workers v. County of Maui, Department of Public Works and Waste Management, (Grievance of Simeon Park) (Kam, 1998); United Public Workers v. County of Maui, Department of Water Supply, (Grievance of Arnold Torres) (Hunter, 2001). Also see Elkouri and Elkouri, How Labor Arbitration Works, (5th Edition) pages 849-851.

## VIII. DID THE EMPLOYER VIOLATE SECTION 16.07 OF THE COLLECTIVE BARGAINING AGREEMENT?

Section 16.07 of the CBA provides that the Employer shall prepare tests and/or examinations that are directly related to the job in question. It provides as follows:

> 16.07 The Employer shall continue its efforts to devise tests and/or examinations that directly relate to the skills, abilities, and qualifications actually required for the class.

There are many issues regarding Section 16.07 that were raised by the Employer and the Union during the hearing on this matter as well as in the well written closing briefs submitted by each party. Each party has set forth very convincing and logical arguments

as to why this Arbitrator should accept their respective positions. A discussion of the most important issues raised by the parties that are relevant to this Arbitrator's decision are discussed below.

**VIIIA. IS THE UNION EQUITABLY ESTOPPED FROM ATTACKING THE EXAMINATION INSTRUMENT AS VIOLATING SECTION 16.07 OF THE COLLECTIVE BARGAINING AGREEMENT ON THE GROUND THAT THE EXAMINATION INSTRUMENT IS UNRELATED TO THE SKILLS, ABILITIES AND QUALIFICATIONS FOR THE POSITION OF TRACTOR OPERATOR?**

During the Arbitration hearing, Mr. Mel Rodrigues, the business agent for the Grievant and the Grievant gave several reasons each believed that the Examination Instrument did not directly relate to the skills, abilities, and qualifications required for the tractor operator position. However, the Employer raised equitable defenses and argued that the Union should be estopped from attacking the Examination Instrument. **A discussion of the merits as to whether the Examination Instrument directly relates to the skills, abilities and qualifications for the position of tractor operator would only be necessary if this Arbitrator found that the Union was not equitably estopped from attacking the Examination Instrument.** The doctrine of equitable estoppel is firmly established as part of Hawaii law (and is the common law in most states) as applying to individuals and their privies. Filipo v. Chang, 62 Haw. 626, 618 P.2d 295 (1980). The rule of law is clear that where one by his words, or conduct, willfully causes another to believe the existence of a certain state or things, and induced him to act on that belief so as to alter his previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. Anderson v. Anderson, 59 Haw. 575, 587-88, 585 P.2d 938, 946 (1978) (quoting

Molokai Ranch, Ltd. v. Morris, 36 Haw. 219, 223 (1942)). "'[O]ne cannot blow both hot and cold.' Yuen v. London Guarantee & Accident Co., 40 Haw. at 230 (quoting McDanels v. General Insurance Co., 1 Cal. App. 2d 454, 459, 36 P.2d 829, 832 (1934));" University of Hawaii Professional Assembly ex rel. Daeufer v. University of Hawaii, 66 Haw. 214, 221, 659 P.2d 720, 726 (1983).

One who invokes the doctrine of equitable estoppel must show that he or she has detrimentally relied upon the representation or conduct of the person sought to be estopped and that such reliance was reasonable." Strouss v. Simmons, 66 Haw. 332, 43, 647 P.2d 1004, 1012 (1982); Waugh v. University of Hawaii, 63 Haw. 117, 129-30, 621 P.2d 957, 967 (1980). However, in Filipo v. Chang, supra, the Supreme Court of Hawaii held "that, under the facts of that case, the usual reliance element of equitable estoppel could be dispensed with in order to prevent manifest injustice." Waugh v. University of Hawaii, 63 Haw. at 130, 621 P.2d at 967. In the final analysis, equitable estoppel is dependent upon "a close analysis of individual fact situations for its application. Further, courts seem to implement interest balancing in their discussion of whether manifest injustice would result. Filipo v. Chang, 62 Haw. 634, 618 P.2d at 300. UCSF-Stanford Health Care v. Hawaii Management Alliance Benefits and Services, Inc., 58 F. Supp 2nd 1162 (1999); County of Kauai v. Scottsdale Ins. Co. Inc., 90 Haw. 400, 978 P.2d 1297 (1998); Turner v. Chandler, 87 Haw. 330, 955 P.2d 1062 (1998); Roxas v. Marcos, 89 Haw. 92, 969 P.2d 1209, reconsideration denied, (1999); GCS Co. , Ltd. v. Masuda, 82 Haw. 96, 919 P.2d 1008 (1996); Jackson v. Jackson, 84 Haw. 319, 933 P.2d 1353 (1997). Note that equitable and quasi estoppel, unlike promissory

estoppel does not require a promise to be applicable to a case situation.[2]

Arbitrators have been known to decide cases specifically on the basis of estoppel and waiver. See Minnesota Department of Natural Resources, 87 LA 264, 272 (Bard, 1986); Indiana Gas Co., 88 LA 666; 669 (Siedman, 1987); City of Deprere and Deprere Municipal Employees Association, 86 LA 733, 734 (Greco, 1986); PA Bureau of Labor Relations, 77 LA 438, 442-43 (Dunn, 1981); City of San Jose, 76 LA 732, 735 (Conception, 1981); Pacific Telephone and Telegraph Co., 73 LA 448, 455 (Marcus, 1979); Ohio State University, 69 LA 1004 (Bell, 1977); and Town of Waterford, 68 LA 735, 737 (Sack, 1977). For example, where a company gave oral assurances on a matter during contract negotiations to induce the union to agree on a contract and end a strike, Arbitrator Whitley P. McCoy held that an estoppel had been created against the company since the Union had changed its position, suffering detriment, in reliance upon the assurance. Accordingly, the company was held bound by the oral assurance, which limited the number of employees the company could re-classify under a provision of the contract. International Harvester Co., 18 LA 101, 103 (1951). Similarly, see Master Builders' Association, 48 LA 865 (Kates, 1967), Collins Radio Co., 36 LA 15, 17 (Schedler, 1961); and International Harvester Co., 18 LA 306, 307 (Forrester, 1952).

Evidently, the Employer and the Union worked together in developing the Examination Instrument. Mr. Bert Yamamoto testified that as the Administrator of the O & M Section, he directed Mr. Randal Tanaka to use the Examination Instrument during

[2] For a comparison of equitable estoppel and promissory estoppel see Gonsavles v. Nissan Motor in Hawaii, 100 Haw. 149, 58 P.3d 1196 (2002). For a discussion of equitable estoppel in the context of arbitration, tenure and promotions, see University of Hawaii Professional Assembly on Behalf of Daeufer v. University of Hawaii, 66 Haw. 214, 659 P.2d 720 (1983). For a discussion of quasi estoppel, see SCI Management Corp. v. Simms, 101 Haw. 438, 60 P. 3d 748 (2003) and Maria v. Fuentes, 73 Haw. 266, 684 P.2d 780 (1992). It appears as if the Union is estopped from arguing that the Examination Instrument was unrelated to the skills, abilities and qualifications for the position of tractor operator under both the doctrine of promissory estoppel and quasi

the selection process based upon the following:

> Well, we had… Several years back we had interviewed for a Tractor Operator position. And the higher seniority person wasn't selected. There was someone lower than – with lower seniority selected. So there was a grievance…
>
> We selected this man by the name of Darryl Apostol. And Benjamin Lono was the senior man. He did not get selected so he grieved…
>
> We met with the Union. And we had – there was an agreement made where we would – questions that we had used and the rating system that we used was not satisfactory. So what we did was se redid the questions and we had Mr. – at the time landscape architect, George Tonaki, redid the questions. And we took those questions and we sent it to personnel, then we sent it to the assistant superintendent to look at. And then we got their input and then we sent it to UPW. UPW looked at it. And then it was agreed upon that was the questions that were gonna be used. They put some input and we changed. Like they put in "others" and … one of the answers. And they wanted to include TA time and different things. And we did that. And then it came back and that was the questions we were gonna - you know, was agreed upon by us and the UPW. So we decided – you know, everybody agreed on that. So we used that for the different interviews.

(Tr. 339-340).

Mr. Bert Yamamoto evidently met and worked with Union Representative Dwight Takeno on the Examination Instrument. That meeting occurred on May 5, 1994. (Tr. 342). DOE officials came up with the questions and sent them over to Mr. Takeno for approval. (Tr. 342). Mr. Yamamoto further testified "and there was a verbal okay and so we went for it." (Tr. 342). The Employer subsequently rescinded Mr. Darryl Apostol's position, retested Mr. Apostol and Mr. Benjamin Lono, as well as other applicant's for the position and Mr. Apostol was again selected. (Tr. 342; Employer's Exhibit 14).

Although there is some confusion in the record as to how many grievances Mr. Benjamin Lono subsequently filed after he was not selected again, Mr.

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estoppel. As noted above, a party cannot blow both hot and cold.12

Bert Yamamoto testified that Mr. Lono was eventually selected to the position using the Examination Instrument verbally agreed upon by the Union. (Tr. 424). Mr. Yamamoto further testified that the Employer used this same Examination Instrument several times thereafter, and union members Mr. Charles Kaleihiwa and Mr. Larry Buendia were selected using this Examination Instrument. The Union did not grieve these selections.

Mr. Yamamoto also verified that Employer's Exhibit 14, which contains the September 9, 1994 letter to Mr. Gary Rodrigues from Ms. Emiko Sugino, accurately reflects what had occurred between the parties, and that the revised set of questions were mutually acceptable to the parties. (TR. 349). Employer's Exhibit 14 provides as follows:

> Dear Mr. Rodrigues:
> Re: Grievance on Behalf of Benjamin Lono, Power Mower Operator, Auxiliary Services, Office of Business Services
>
> By letter dated February 1, 1994 from me to Dwight Takeno, Business Agent, the Department of Education, in response to the above-mentioned grievance, agreed to rescind the promotion of Darryl Apostol, Power Mower Operator, to Tractor Driver, effective February 14, 1994, subject to mutual review of the interview questions. We requested at that time for your timely attention so as not to adversely affect the school maintenance program.
>
> Our records show that the last meeting on this issue with Mr. Takeno on May 5, 1994; in attendance from the Department were Mr. Bert Yamamoto and Mr. Walter Figueroa. The parties had been jointly reviewing and revising the interview questions prior to this meeting, and it appeared that the revised interview questions were mutually acceptable. The meeting ended with the understanding that Mr. Takeno would advise Mr. Bert Yamamoto of the final position of the UPW on the revised set of interview questions. We have, to date, not heard from the UPW.
>
> The Department would like to re-interview the candidates, as previously agreed, utilizing the revised interview questions. This matter must be addressed as soon as possible, since the school maintenance program and the morale of other BU1 employees in that work place have been

adversely affected by this long delay in filling the vacancy.

If you have any objections to our plans to proceed with the selection process, please let us know by September 19, 1994. If we do not hear from you or your Business Agent by that date, we will assume that you have no objections. The assistance and cooperation of your staff in the subject review are appreciated.

Sincerely,
Emiko Sugino
Superintendent's Designated Representative

Shortly after Employer's Exhibit 14 was written, Mr. Yamamoto had a telephone conversation with Mr. Dwight Takeno. Mr. Takeno informed Mr. Yamamoto "yeah, go ahead" with the Examination Instrument. (Tr. 349). As noted above, O & M used the Examination Instrument in subsequent interviews for the position because the Employer believed that the Union had agreed to use the Examination Instrument. (Tr. 349).

Mr. Randal Tanaka corroborated Mr. Bert Yamamoto's testimony. Mr. Tanaka testified that Mr. Bert Yamamoto told him to use the Examination Instrument for the interviews because it contained questions that he and UPW Business Agent Dwight Takeno had developed in the past. (Tr. 215). He explained that sometime in 1993, the Union filed a grievance on behalf of Mr. Benjamin Lono after Mr. Lono was not selected to fill a tractor operator position. (Tr. 215). In response to the Union's complaint that the test administered to Mr. Lono did not relate to the position of tractor operator, Mr. Yamamoto collaborated with Mr. Takeno. (Tr. 217-218). In response to the Union's concern that some of the questions related to custodial duties, the Employer took those questions out. (Tr. 218.). The Union also requested that the question on TA assignment be moved from the introductory non-graded portion of the examination to the main part of the examination. (Tr. 219). The Employer complied with the Union's request and

included the TA assignment questions and “other” as categories on Question 7 of the Examination Instrument. (Tr. 219, 339-340). Mr. Tanaka further testified that the Examination Instrument was used in subsequent interviews for the position of tractor operator. Mr. Lono was eventually selected for the tractor operator position using the Examination Instrument that was also administered to the Grievant. (Tr. 219-221).

Mr. Dwight Takeno is the former business agent for the Grievant. He testified that although he knew Mr. Benjamin Lono and served as his business agent, he did not recall representing Mr. Lono when the Union filed a grievance on Mr. Lono’s behalf. (Tr. 437-438). Counsel for the Employer asked several questions regarding Mr. Takeno’s representation of Mr. Lono. Mr. Takeno stated several times that he did not recall representing Mr. Lono. At one moment in time during his testimony, Mr. Takeno stated that he “could have” represented Mr. Lono in a grievance concerning a tractor operator position. (Tr. 438).

Mr. Dwight Takeno was also asked if he was familiar with Union’s Exhibits H and I (which contain the questions administered on the Examination Instrument which Mr. Yamamoto alleges he and Mr. Takeno worked out together) and Employer’s Exhibit 14 (the letter from Mr. Yamamoto to Mr. Rodrigues, dated September 9, 1994. Mr. Takeno testified that he could not say yes or no regarding Employer’s Exhibit 14. (Tr. 436) Mr. Takeno also testified that he could not recall having a telephone conversation with Mr. Yamamoto wherein he informed Mr. Yamamoto that the Examination Instrument for the tractor operation position was acceptable. (Tr. 444).

The above-referenced record indicates that the Employer presented unequivocal evidence that it had mutually agreed with the Union to use the Examination

Instrument. The Union appears uncertain as to whether it agreed to use the Examination Instrument that it now attacks as unrelated to the skills, abilities and qualifications required for the position of tractor operator. The Union did not affirmatively deny the Employer's equitable defenses. Nor did the Union affirmatively deny that it had informed the Employer to use the Examination Instrument. If the Union had affirmatively denied the Employer's allegations, this Arbitrator would have found it necessary to evaluate the credibility of the statements made by the Employer's witnesses and the Union's witnesses on the issue of the Examination Instrument relating to the skills, abilities, and qualifications of the position of tractor operator. Such an evaluation is not necessary since the Employer clearly remembers the events concerning the Examination Instrument and the Union is uncertain or unable to affirmatively deny that such events occurred. **The evidence must logically fall in favor of the person who remembers the events, in this situation, the Employer, as opposed to the Union that is unable to remember or affirmatively deny the event.**

The Employer clearly relied upon the Union's representations when the two worked together in good faith to establish the Examination Instrument that would be viewed by both as a fair and reliable indicator of the skills, abilities, and qualifications required for tractor operator positions.[3] The Employer's reliance and decision to use the Examination was reasonable since the Union had informed the Employer to use the

[3] It has been held that where management works with a union steward to revise test thresholds, it is difficult for a Union to later argue that management acted arbitrarily and capriciously in implementing the procedures. Hendrickson Turner Company and Teamsters 92, 101 LA 137, 138 (Richard, 1993): "There was nothing arbitrary, however, about his studied revision and his proposed mean thresholds to lower levels after discussing through the supervisors that incumbent operators who scored below the mean on the tests were struggling to perform at acceptable levels or, in some cases, failing to perform. That he undertook to examine further, and that he did, in accordance with the steward's request that he set the thresholds as low as he could while assuring that only "qualified" candidates were awarded the job, reduced the standards below the mean, which he originally proposed to use reinforces the Arbitrator's conclusion that the company acted in good faith in establishing, the threshold which it now uses. (This is not to say that further experience may not lead to a further revision of those thresholds, but is only to say that in setting them

Examination Instrument. In addition, the Examination Instrument was used in the Lono grievance and in the promotional process concerning Mr. Charles Kaleihiwa and Mr. Larry Buendia. The Employer suffered prejudice by spending manpower hours and funds negotiating the Examination Instrument. Given the totality of circumstances as set forth above, manifest injustice would occur if this Arbitrator did not find that the Union was equitably estopped from attacking the Examination Instrument. Accordingly, this Arbitrator finds that the Union is equitably estopped from attacking the Examination Instrument from attacking the Examination Instrument as not relating to the skills, abilities and qualifications required for the position of tractor operator. The Employer did not violate Section 16.07 of the CBA since the Union devised the Examination Instrument with, at a minimum, the cooperation and consent of the Union.

**VIIIB. WAS THE EXAMINATION INSTRUMENT ADMINSTERED BY QUALIFIED INDIVIDUALS WHO WERE FAIR AND IMPARTIAL.**

Although this Arbitrator has found that the Union is equitably estopped from challenging the Examination Instrument, the Examination Instrument must still be administered fairly and by qualified individuals. In addition, if one of the panel members is prejudiced or biased against a candidate, as alleged by the Union, This Arbitrator must find that the Examination Instrument was administered arbitrarily and capriciously.

**VIIIB.1 THE PANEL MEMERS DID NOT GIVE UNIFORM MARKS TO THE GRIEVANT. DOES THIS INDICATE THAT THE PANEL MEMBERS ACTED ARBITRARILY AND CAPRICIOUSLY WHEN THEY ADMINISTERED THE EXAMINATION INSTRUMENT TO THE GRIEVANT?**

This Arbitrator was initially very concerned that interview members did not

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as they are today, the company acted in good faith.)"

give uniform marks for each of the questions asked during the administration of the test instrument. Mr. Hagino had brought this to the attention of this Arbitrator. However, Ms. Linda Shinsato, the recruitment and examination specialist for the DOE logically and reasonably explained this difference by stating as follows:

> Because there's a human element to every interview. Were still looking at interviews that were conducted by people. It's not a multiple-choice examination where you just check off A, B, C, or D. These candidates are giving you oral responses. And panelists may have taken it differently. Depends on how well it was articulated and how the response was given.

(Tr. 636).

Ms. Shinsato's explanation appears logical and reasonable. Given the totality of circumstances as set forth above, this Arbitrator does not believe that the examination panel members acted unfairly, arbitrarily, and capriciously by failing to provide uniform marks to the Grievant.

**VIIIB.2 WAS PANEL MEMBER ADMINISTRATOR MR. BERT YAMAMOTO QUALIFIED TO PARTICIPATE IN THE EXAMINATION PROCESS AND DID HE FARILY SELECT THE EXAMINATION PANEL MEMBERS?**

Mr. Bert Yamamoto is the former Head of the Operations and Maintenance Section of the DOE with 32 years of service. He testified that at the time of the hearing on this matter, he had been retired for two years. (Tr. 327). Prior to retiring and at the time the selection in this case took place, he was the administrator in charge of the O & M Section of the DOE. (Tr. 327.) He held this position for approximately five years. (Tr. 329). Prior to that position, he was a Safety and Security specialist for three years, a Principal at Momilani Elementary School and Sunset Elementary School for approximately eight years, and served as Vice Principal at Waianae Intermediate

School for approximately five to six years. (Tr. 327-329). He also taught for approximately ten years. (Tr. 329). In his position as Administrator for the O & M Section, among other matters, he was responsible for the entire mowing operations for the DOE (Tr. 330). In terms of hierarchy, he was Mr. Patrick Oka's direct supervisor. (Tr. 330).

Mr. Yamamoto, as head of the O & M Section, was responsible for selecting the chairperson of the examination panel. (Tr. 336). He selected Mr. Bert Tanaka because as a former Principal and educational officer, Mr. Tanaka would give the examination panel credibility. (Tr. 336). Mr. Yamamoto also selected Mr. Tanaka because Mr. Tanaka because Mr. Tanaka was a School Inspection Specialist who ran the school inspection program and was responsible for grading educational facilities and school grounds throughout the State. (Tr. 337-338). After the examination panel forwarded the exam results to Mr. Yamamoto with a recommendation as to who should be selected for the position, Mr. Yamamoto made the decision as to who should be selected for the position. (Tr. 335-336). He forwarded his decision to the Assistant Superintendent for final approval. He testified that it has been his practice to defer to the examination panel's judgment and to accept the examination panel's recommendation for the position, unless he strongly felt the candidate selected was not suited for the job. (Tr. 355).

Mr. Yamamoto further testified that while he was a Vice Principal and Principal, he served on approximately fifty to seventy interview panels. (Tr. At 333). While employed at the O & M Section, he served on approximately fifteen interview panels, two of which involved tractor operator positions. (Tr. 334-335). He testified that

he directed MR. Randal Tanaka to use the Examination Instrument. (Tr. 334-335).

Mr. Yamamoto has five to seven years of experience overseeing power mowers and tractor operators. He also has experience serving on other tractor operator interview panels. He is a learned educator and administrator. Other than selecting the examination panel, he was not involved in the administration of the Examination Instrument. Since there is no evidence in the record to suggest that Mr. Yamamoto unduly or improperly interfered with the administration of the Examination Instrument or that he was prejudiced or biased against the Grievant, this Arbitrator finds that Mr. Yamamoto was most certainly qualified to select the examination panel members, that he did not unduly or improperly select the examination panel members and that he was not biased or prejudiced against the Grievant.

**VIIIB.3 WAS PANEL MEMBER RANDAL TANAKA QUALIFIED TO PRARTICPATE IN THE EXAMINATION PROCESS AND DID HE FAIRLY ADMINISTER THE EXAMINATION INSTRUMENT?**

Mr. Randal Tanaka, the Chairperson of the examination panel testified that at the time the interviews were held for the position in question, he was employed as a School Inspection Program Specialist. (Tr. 134-135). He held this position since 1995 or 1996. (Tr. 134-135). Subsequent to the selection process, but after the initial hearing concerning the subject grievance, Mr. Tanaka was named the Principal of Kalakaua Middle School. (Tr. 649). Prior to holding this position as School Inspection Program Specialist, he held the position of Principal of Waianae High School for approximately four to five years. (Tr. 135). In his position as School Inspection Program Specialist, he reported directly to MR. Bert Yamamoto, the Administrator for the

Operations and Maintenance (O & M) Section of the Department. (Tr. 139).

The record indicates that Mr. Randal Tanaka has extensive experience serving on interview selection panels. (Tr. 136). During his tenure as Principal, he served on interview panels for vice principal, teacher, head custodian, cafeteria manager, cafeteria worker positions, and a "lot of classified people." (Tr. 136). During the period between 1995 and 1999, while employed in his position as School Inspection Program Specialist, he served as a panelist member for approximately six or seven interviews, including interviews for positions such as tractor operator, landscape architect, branch secretary, power mower operator and custodial superintendent. (Tr. 137-138). For employees in the O & M Section of the DOE, he participated in approximately three or four panels involving similar examinations to the one that was administered to the Grievant and the Selectee. He has served on over 100 interview panels during his career at the DOE. (Tr. 652).

As chairperson of the panel, prior to administering the interviews, among other things, Mr. Randal Tanaka reviewed the duties and responsibilities required for the position of tractor operator and compared it with the proposed questions for the interview to make certain there was a logical relationship between the two. Based on his extensive experience in participating in interview panels, his past experience as actually serving as a panel member for a tractor operator position, and his familiarity with the position itself, Mr. Takaka testified that he believed that the Examination Instrument relates to the skills, abilities and qualifications required for the position of tractor operator. (Tr. 213-214).

Prior to administering the interviews, Mr. Randal Tanaka discussed the

skills, abilities and qualifications required of the position with the other panel members, discussed the rating factors and the method to be used to rate individual applicants. (Tr. 652). He testified that the rating methodology used for the Examination Instrument is similar to the methodology used in previous examinations he administered. (Tr. 652-653). He further testified that panelist members were given instructions on how to fill out the Application Worksheets. (Tr. 654). In addition, he testified that the Application Evaluation Worksheet scoring sheet is similar to scoring sheets that were used in past interview panels that he had served on. (Tr. 654). Mr. Tanaka further testified that he found no need to make any changes to the scores on the examination worksheets for either the Grievant or the Selectee. (Tr. 223, 226). Moreover, he testified that based upon what he observed during the interview, the Selectee is the more qualified candidate of the two. (Tr. 236).

Mr. Tanaka also testified that on the day of the examination the Employer provided a copy of written Standard Operating Procedures for Power Mowers, Tractors, and Trucks (SOP) (Employer's Exhibit 10) to each of the applicants as they came in for their interviews. (Tr. 143, 226). Prior to the actual interviews, all applicants were asked whether they had the opportunity to review the SOPs and whether they had enough time to review it. (Tr. 152, 226). There is no evidence in the record that any of the applicants, including the Grievant, expressed that the Employer did not give them enough time to review the procedures or that they were unfairly prejudiced because of the way the SOPs were disseminated during the selection process.

Mr. Randal Tanaka concluded his testimony by testifying that the interviews were conducted properly, the selection process was reasonable and

uniformly applied and no one received an unfair advantage. (Tr. 657). There is nothing in the record to indicate that he unfairly administered the Examination Instrument or that he was prejudiced or biased against the Grievant. Grievant himself testified that he had no problems dealing with MR. Tanaka. (Tr. 729-730). This Arbitrator finds that Mr. Randal Tanaka is qualified to sit as a panel member and that he was not prejudiced or biased against the Grievant.

**VIIIB.4 WAS IT PROPER FOR MR. RANDAL TANAKA TO SELECT THE GRIEVANT'S SUPERVISORS TO ACT AS EXAMINATION PANEL MEMBERS?**

Mr. Randal Tanaka selected two of the examination panel members who were supervisors of the Grievant, specifically, Mr. Patrick Oka and Mr. Arthur Sagon. Mr. Oka is the direct supervisor of MR. Sagon. Mr. Sagon is the direct supervisor of the Grievant. (Tr. 468). Supervisors can provide invaluable insight into the qualifications of employees they supervise. Arbitrator Arthur M. Ross noted the importance of supervisory opinions in Pacific Gas & Electric Co., 23 LA 556, 558 (Ross, 1954):

> Considerable weight should be given to bona fide conclusions of supervisors when supported by factual evidence. In the first place, a supervisor is responsible for the efficient performance of his unit and has a legitimate concern that the employees be properly assigned to achieve this objective. In the second place, he has a deeper and more intimate acquaintance with the men under his charge than an arbitrator is able to acquire in a brief hearing.

Six years later Arbitrator Arthur M. Ross again addressed supervisory opinions in San Francisco News-Call Bulletin, 34 LA 271, 273 (Ross, 1960):

> … considerable weight should be given to bona fide conclusions of supervisors when supported by factual evidence. (See my decision in Pacific Gas and Electric Company, 23 LA 556, 558.) This may well be the decisive factor in close or borderline cases.

Supervisory opinion has been given controlling weight where management's decision to bypass the senior employee was based upon a composite of the opinions of several company officers who had almost daily contact over many years with the employees, and thus knew them well and knew the process and machines well. Pittsburgh Standard Condit Co., 32 LA 481, 482-83 (Lehocxky, 1959). In addition, supervisory opinion has been given great if not controlling weight where several levels of supervision, familiar with the work performance of the bidders and with the requirements of the job being bid upon, reached a unanimous decision. Paauhau Sugar Co., 55 LA 477, 480 (Tsukiyama, 1970); Brookhaven National Laboratory, 54 LA 447 (Wolff, 1970); Standard Oil Co., 54 LA 298, 301-02 (Beeson, 1970); Penn Controls, Inc., 45 LA 129, 130-31 (Larkin, 1965). Likewise, Arbitrator Tsukiyama gave great deference to the testimony of interview panelist members who were intimately familiar with the objectives, policies, and operations of the workplace in question, and who personally knew the applicants. He found:

> …their ratings and opinions should be entitled to persuasive weight and credence as to their findings that the selectee was the more qualified applicant, in the absence in this record of any discrimination, favoritism or bad faith (Grievance of Cynthia Kawada, page 6.)

Also see Laupahoehoe Sugar Co., 38 LA 490 (Tsukiyama, 1961) (having supervised applicants for periods ranging from one and one half-years to three years, gave the witnesses an "adequate basis for observation and a firm foundation for their opinion," because they were "more intimately acquainted with the relative qualifications of the applicants than the Arbitrator ever would be"). Accordingly, absent a clear showing of prejudice and bias, it was most proper for Mr. Randal Tanaka to invite supervisors Mr.

Patrick Oka and Mr. Arthur Sagon to act as examination panel members.

**VIIIB.5 WERE PANEL MEMBERS MR. ARTHUR SAGON AND MR. PATRICK OKA QUALIFIED TO PARTICIPATE IN THE EXAMINATION PROCESS AND DID THEY FAIRLY ADMINISTER THE EXAMINATION INSTRUMENT?**

Examination panel member Mr. Arthur Sagon testified that he is employed with the O & M Section of the DOE as a power mower operator supervisor. (Tr. 15, 17). He started working with the DOE in 1984 as a power mower operator and was subsequently promoted to the position of tractor operator sometime before 1990. (Tr. 16). In 1999, the DOE promoted him to his current position. (Tr. 17). He is familiar with the skills, abilities and qualifications required for the tractor operator position. He worked as a tractor operator for a period of at least 9 years. He is responsible for supervising four tractor operators. (Tr. 17, 79). He has known the Grievant since approximately 1990 or 1991, has known the Selectee since 1997, and has knowledge of both individuals' work abilities as he directly supervises both of them. (Tr. 28, 80). He has close to eighteen years of experience mowing lawns. (Tr. 80). He has experience serving on interview panels for the positions of power mower and tractor operator. (Tr. 98).

Mr. Sagon testified that the Examination Instrument used for the tractor operator interviews relate to the skills, abilities and qualifications required for the tractor operator position. (Tr. 80). He further testified that he did not wish to make any changes to the Evaluation Worksheets he compiled for the Grievant and the Selectee after the interviews were administered to all applicants. (Tr. 81-82; Union Exhibits C and E). This Arbitrator finds that Mr. Arthur Sagon is qualified to participate as an examination panel

member.

Mr. Oka was the third examination panel member. He testified that he has held the position of landscape architect for the O & M Section of the DOE since 1998. (Tr. 468, 472). He has a Bachelor's degree from the University of Hawaii and received apprentice training in landscape architecture in Japan. (Tr. 468). He is a licensed landscape architect and a certified arborist. (Tr. 468, 469). He has 25 years of experience as a landscape contractor and has a total of 40 years in landscape architecture. (Tr. 469, 471). He is in charge of all mowing crews from the educations facilities in the State of Hawaii.

Mr. Patrick Oka is familiar with the tractor mower machine and the duties and responsibilities required for the tractor operator position. (Tr. 474). To the best of his recollection, he served on at least five to six interview panels, two to three of which involved interviews for tractor operator positions. (Tr. 476). He served on the interview panel when Mr. Benjamin Lono applied for the tractor operator position and also served on the selection panel when Mr. Charles Kaleihiwa was selected for the position of tractor operator. (Tr. 476).

Prior to administering the Examination Instrument, Mr. Patrick Oka reviewed the position description and the class specifications for the tractor operator position. (Tr 477, 479-480). He verified Mr. Randal Tanaka's testimony that prior to the interviews, the panel members reviewed the interview questions to determine if they were related to the position of tractor operator. (Tr. 481).

Mr. Oka testified that after Chairperson Bert Tanaka asked for input on the questions, examination panel members felt the Examination Instrument was an

appropriate instrument because they used it for previous tractor operator interviews and they were told that is was approved by the Union. (Tr. 481). He further testified, unequivocally, that he believed that the Examination Instrument relates to the skills, abilities and qualifications required for the tractor operator position because, “it covers all facets of what the operator has to do and has to know.” (Tr. 481). He also verified Mr. Tanaka’s testimony that prior to administering the examination, panelist members discussed the rating factors and the overall method or system to be used in rating applicants for the position. (Tr. 482). With reference to the Application Evaluation Worksheets in Union’s Exhibit C, prior to finalizing the scores of each candidate, panel members were instructed on how to fill out the form. He also testified that the same rating sheet was used in other selection interview cases in which he participated. (Tr. 482-484).

Mr. Patrick Oka concluded his testimony by stating that the selection process was reasonably administered in this case and that it was uniformly applied to all applicants. (Tr. 493). He also did not indicate that there was a need to change any of the scores on the Examination Instrument. Given Mr. Oka’s experience in participating on interview panels for tractor operator positions, his extensive experience in law moving and landscape architecture, and his direct supervision of the Grievant and the Selectee, this Arbitrator finds that he was qualified to administer the Examination Instrument.

The Grievant has alleged that Mr. Arthur Sagon and Mr. Patrick Oka had confrontations with the Grievant. Given these confrontations, the Grievant further alleged that Mr. Sagon and Mr. Oka were prejudiced and biased against him during the

interview examination. A charge of bias or discrimination cannot reset upon surmise, inference or conjecture, but requires clear proof. UPW v. State of Hawaii, Department of Health (Grievance of J. Keliikuki, III). (Najita, 1991).

The Grievant is and at all times mentioned herein a union steward. (Tr. 32, 254, 502). In this capacity, the Grievant is responsible for enforcing the CBA (Tr. at 253-254). Therefore, when a union steward is disciplined or denied a promotion, an Arbitrator should review the union steward's grievance, all the while being mindful that an Employer may be prejudiced or given the union steward's unique status. [4]

A few months before the Grievant's interview with the examination panel, Mr. Sagon used the word "stupid" in reference to something the Grievant was doing.

> I was saying that it look stupid if you went there to pick something when you shouldn't have. But I didn't – I got in trouble for it.

(Tr. 21-22).

The record is unclear as to what the Grievant was doing when Mr. Sagon made this remark. Evidently, the Grievant lodged a complaint against Mr. Sagon with Mr. Oka concerning the above-referenced statement. (Tr. 21-22).

In addition, on May 13, 1999, the Grievant was scheduled to meet with Administrator Mr. Chock. The meeting was canceled because Mr. Chock was on the Island of Lanai. (Tr. 713). Mr. Oka left a message on the Grievant's home telephone answering machine. (Tr. 25, 725-726). As per the Grievant's testimony, the message

[4] It has been considered that punishment for an individual's actions as an employee are subject to modification if it is tainted by ill will carried over from the individual's activities as a union steward. Lawnsdale Industries, 46 LA 220, 223 (McGury, 1966). Obviously, the right of a steward to do his job property must be strictly protected, without fear of retaliation of any kind for the performance of that proper rule. Mere militancy or zealousness can never justify punishment; nor can a steward be limited to the language or behavior of the parlor. The steward is certainly entitled to be wrong on issues that he presses or fights over, on behalf of his constituents, as long as he in good faith believes that his position is correct. Singer-Fidelity, Inc., 42 LA 746, 749 (Rock, 1963).

was “Andrew, this is Pat Oka. I’m calling you to tell you that you don’t have to come to the meeting with Mr. Chock because he’s not gonna be in.” (Tr. 714). Mr. Oka evidently though he was doing Grievant a “favor” by making the telephone call, thereby saving the Grievant an unnecessary ride into town. (Tr. 500-501, 515, 713). The Grievant was upset with the message that Mr. Oka left because the Grievant had received a letter from Mr. Chock informing Grievant that the meeting had been canceled. (Tr. 713-715). Mr. Oka denies knowing anything about a letter from Mr. Chock. Subsequently, the Grievant called the office. Mr. Oka testified:

> …[I]t was not a personal kind of confrontation. It was a matter of principle of notifying him. You know?... Like doing a favor in an emergency. And he said “Don’t ever call me.” But I had to respond because he called the office and chewed the girl out, swore at her and, you know, made bad remarks and had a bad situation in the office. The girls were shaking.

(Tr. 500-501).

Mr. Oka approached Grievant after the Grievant arrived for work and asked him what was wrong. Grievant, visibly upset, informed Mr. Oka “[under no circumstances are you supposed to call my house.” (Tr. 501). Mr. Oka further testified:

> So when I saw him… and that was the first time I met him. And then I asked him, “you angry?” He said yeah. And then I said I’m Pat Oka and he said “I know.” And then I said, “I’m sorry about the telephone thing. He said “yeah.” He further said “I don’t want anybody calling me under any circumstances.” So I got made and said, don’t expect any, you know, the bad work, F favors from me in the future. Because I was doing a favor for him when I called. And a favor did occur after that when somebody got very ill in his family.

(Tr. 501).

Mr. Oka denied using the “F” word directly to Grievant as a person, but only in reference to the favor. (Tr. 502). The Grievant testified that approximately 2-3 months after the incident, Mr. Oka apologized to Grievant. If is unclear from the record if the apology was

for using the “F” word in the context of a “favor,” for the incident in general, or for some other reason. The Union alleges that these incidents made Mr. Oka and Mr. Sagon prejudiced against Grievant and since they both were panel examination members, the Employer acted arbitrarily and capriciously against Grievant. The Union further argues that the test results must be set aside.

The Union also argued that since Mr. Oka spoke to Mr. Arthur Sagon for his “stupid” remark to Grievant, this action **constituted discipline** and tainted Mr. Sagon against Grievant. The Union refers to Section 11 of the CBA which provides:

> Section 11. DISCIPLINE.
>
> 11.01 PROCESS
>
> 11.01a. A regular Employee shall be subject to discipline by the Employer for just and proper cause.
>
> 11.01b. An Employee which is disciplined, and the Union shall be furnished the specific reason(s) for the discipline in writing on or before the effective date of the discipline except where the discipline is in the form of an oral warning or reprimand. However, if the oral warning or reprimand is documented or recorded for future use by the Employer to determine future discipline the Employee who is disciplined shall be furnished the specific reason(s) for the oral warning or reprimand in writing.
>
> 11.01c. When an Employee is orally warned or reprimanded for disciplinary purposes, it shall be done discreetly to avoid embarrassment to the Employee.

If Mr. Oka had disciplined Mr. Sagon over the use of the word “stupid,” such discipline would create a presumption of prejudice against Mr. Sagon that would be difficult for the Employer to overcome. In addition, it would most certainly create an appearance of impropriety so significant that the Employer should not have asked Mr. Sagon to be an examination panel member concerning the Grievant.

Sometimes there may be a **fine line** between counseling and discipline. Counseling between a supervisor and a subordinate generally occurs when the two parties meet confidentially, in the spirit of cooperation, to verbally discuss in a non-confrontational manner, an employer's expectations, specific issues, and any corrective measures that the Employer believes should be taken by the employee, to assist the employee in meeting management's expectations. Since discipline is punitive in nature while counseling is not, a supervisor who is counseled as to how he treats his employee(s) is not necessarily prejudiced against the employee(s). Something other than mere counseling is necessary to show prejudice and bias.

In counseling, since the objective of the employer is to assist and help the employee become a better employee, rather than punish, as a general rule, if there is a publication or memorialization of the meeting, it should not be written in a disciplinary tone, it should be kept confidential, it should not be placed in the employee's personnel rile and it would not be part of a progressive disciplinary process. The totality of circumstances of each case indicate if a supervisor's action constitutes disciplinary action.

For example, in Timex Corp., (Seitz, 1970), an "employee incident report" was issued with respect to the grievant and placed in his personnel file. Evidently, during his shift, a valuable too was stolen. The report recited various facts that did not mention him by name, was addressed to all tool room employees and advised employees to be responsible and cautious. The report did not charge grievant with misconduct, a reprimand, or even a warning. However, Arbitrator Seitz found that the action was disciplinary because the report could be resorted to in determining an

appropriate disciplinary penalty if a similar event occurred again.

Likewise, in Federal Labor Union v. American Can Co., 21 LA 518 (Francis, 1953), the grievant received a memorandum stating:

> This is notice that your work and attitude toward your work has not been satisfactory. Production on the equipment maintained by you has been consistently under par. You have made no effort to improve production on your equipment. If this condition continues to exist, you will be removed from the End Dept.

The Union asserted that the "warning" was discipline. The Employer argued that the action was a mere reprimand that was not subject to the CBA provision that an employee could only be disciplined "for proper cause." The arbitrator, in finding that the action constituted discipline, stated as follows:

> We recognize at the outset of our consideration of the case that care must be exercised to avoid infringing upon the normal prerogatives of management beyond the point to which they have been subjected by contract. It is clear that an employer has the right to reprimand or criticize that work performance of an employee and to make notes thereof for his records; plainly also, as the employer suggests, it has the right to evaluate the aptitude, interest, ambition and performance of an employee and make a record thereof. If this were not so and arbitration had to be engaged in for every such action, normal business operations would be well nigh impossible…
>
> It seems to us from a study of the agreement in light of the various definitions that the reasonable formula to be applied here in passing upon the employer's action is reprimand plus penalty equals discipline…Measuring the conduct by this formula produces the conclusion that these employees were disciplined.

Similarly, in Donaldson Co., Inc., 29 LA 826 (Louis ell, 1953), the Employer issued 12 warnings to employees who allegedly "washed up" on company time. The Employer argued that the warnings were not disciplinary in nature. However, the Union argued that the warnings were in fact discipline. Arbitrator Louis ell stated as

follows on the issue of discipline:

> [T]here is an obligation on the Company to proceed reasonably with respect to all disciplinary matters. And, while the warning notices have not been entered in the personnel records of the individuals involved, it seems to the Arbitrator that, realistically viewed, these warning notices are in truth disciplinary measures, even though there is not an immediate sanction behind them. This conclusion is reinforced by the reaction at the hearing of certain of the employees, old in service and responsible in attitude, that they had for the first time in their long careers at the Company, received chaffing reprimands. The truth is that a "warning" almost inevitably carries with it the connotation of "reprimand," especially when, as here, issued to a selected few.

Also, in Duval Corp., 43 LA 106 (Meyer, 1964), Arbitrator Meyer stated as follows regarding just cause and warnings:

> Ordinarily, Arbitrators refrain from arbitrating past disciplinary actions in a Current case. However, in this instance, the Company appears to be holding past "warnings" against an employee when they were not put into written form, such form as they might become, under the practice of the parties to this agreement, subject to a grievance. At the hearing,. The Union did not object to Company testimony about past performance, nor did the Company object to its rebuttal. For these reasons, I have made findings about the validity of alleged past warnings, and will draw conclusions from them.
>
> The contract requires me to judge the justice or injustice of the discipline. I have found that X--- did in fact violate Working Rule 4 in that he disobeyed an order which was reasonable under the circumstances. I have found that he did not violate Working Rule 8, and, further, that the prior warnings were unfounded and that therefore any action based on them is unjustified… Any further, including the entry that "further violations of this nature will result in immediate discharge is unjustified in that it is based on the alleged past warnings and the unfounded charge of loafing.

If "warnings" can be used as a basis for discharge in disciplinary action, they must be treated as disciplinary in nature and are subject to the just and proper cause test.

Lastly, in Port of Tacoma, 99 LA 1151 (Smith, 1992), Arbitrator Smith applied the "just cause" test to "counseling statements" and "warning letters" which he

assumed were disciplinary action. It appears from case law that the event, rather than the name given to the event determines if an action is counseling in its traditional form and therefore not discipline, or discipline which must meet the just and proper cause standard.

This Arbitrator, in determining if an employer's actions constitute "counseling" or "discipline" or some other form of action looks at the totality of circumstances regarding a specific case situation. Although the name assigned to a particular action may be relevant, the factual circumstances of a specific case situation determines if an action taken by an employer is counseling or discipline. Given the case law on this issue, the questions that this Arbitrator considers are as follows:

1. Does the employer's description of the employee's action imply counseling or discipline?

2. If the employer's action is oral, has it also been published?

3. If the employer's action is not oral, is it published or memorialized for other employer agents to review?

4. Did the employer fail to tell the employee that the counseling action would remain confidential?
5. Did the employer's action fail to offer help and assistance as to how the employee could become a better employee?

6. If the employer's action has been published or memorialized, does it contain negative information about the employee?

7. Did the employer fail to inform the employee that he was being counseled or disciplined?

8. Is the employer's action part of a progressive disciplinary process?

9. Is the employer's action, published or memorialized, placed in the personnel file(s) of the employee?

10. Did the employer inform the employee that the counseling action could be used against the employee in any future disciplinary action?

11. Does the Employer's action include any type of penalty?

12. Does the Employer's action in any way affect the employee's Future job opportunities, benefits, or wages with the employer?

13. Is there any other factor, based upon a reasonable person standard, that would lead the employee to believe that the employer's action will result in immediate disciplinary action or will lead to future disciplinary action?

An Arbitrator must look at the totality of circumstances (13 factors above) in determining if counseling or other action is in fact discipline that is subject to a find of just and proper cause. Under this Arbitrator's totality of circumstances test, the more affirmative responses to the thirteen (13) above-referenced questions, the greater the likelihood that the supervisor's action is not counseling or some other from of action, but rather discipline. [5]

It is clear from the record that Mr. Patrick Oka spoke to Mr. Arthur Sagon regarding Mr. Sagon's use of the work "stupid" as it related to something that the Grievant was doing. However, there is absolutely nothing in the record to indicate that Mr. Oka disciplined Mr. Sagon, either by giving him a warning or reprimand, whether it be oral or written. Nor is there evidence that Mr. Oka disciplined Mr. Sagon in any other matter. For example, there is nothing in the record that Mr. Oka informed Mr. Sagon that

[5] In regard to "counseling sessions," the NLRB has consistently held that the right to union representation at an interview included the right of prior consultation between the employee and the union representative where the employee had a reasonable expectation that he may be disciplined. NLRB v. Glomas Plastics, Inc., 97 LRRM 1441) (1978). In addition, the right to union representation may be invoked where it was clear that the counseling session was held to discuss production quotas and the sessions were a preliminary step to the imposition of discipline. NLRB v. Alfred M. Lewis, Inc., 95 LRRM 1216 (1977). However, the right to representation does not extend to instances of normal counseling. In NLRB v. Amoco Oil, (99 LRRM 1017) (1978), the board held that employees were not denied union representation in view of the supervisor's assurances that the sessions were not disciplinary meetings and would not be recorded in their personnel files. The board also stated that the Weingarten rule does not apply to "run-of-the-mill shop-floor conversations where instructions are given or work techniques are corrected and there is no reasonable basis for an employee to fear an "adverse impact" from the interview. "Counseling Statements," if they are disciplinary in nature, are subject to the requirements of just cause.

Mr. Sagon was being counseled or disciplined. Nor is there anything in the record to indicate that their discussion was published for other employer agents to review, that it could be used later as a part of progressive disciplinary action, that it would be placed in his personnel file(s), or that that Mr. Sagon was being penalized in any way whatsoever. The conversation between Mr. Oka and Mr. Sagon most certainly was not disciplinary in nature and was not proven to even constitute counseling. If is significant to note that Mr. Sagon felt that he got into “trouble” when Mr. Oka found it necessary to speak to him regarding the Grievant. However, it was never established what the word “trouble” meant to Mr. Sagon. Mr. Sagon appeared to be more embarrassed about having used the word “stupid” regarding Grievant’s work and even more embarrassed when he spoke to his supervisor about the incident. There is insufficient evidence in the record to establish that Mr. Sagon was either disciplined or counseled. Accordingly, this Arbitrator will find that Mr. Sagon was neither disciplined nor counseled concerning the use of the word “stupid” and the events that took place thereafter.

Humans, given their basic instincts, are fare from being perfect beings. They make mistakes in relationships with their spouses, friends, family, relatives and other people they come into contact with. This includes contact with individuals in the workplace. Imperfection is part of being human.

At a particular moment in time, a worker, supervisor, department head, employee or other person may commit an error in judgment and treat a co-worker unfairly. However, the fact that one person treats another unfairly, no matter how irresponsible or immature the action may be, does not necessarily mean that the person will be forever prejudiced and biased against the person who was treated unfairly. The

person committing the error in judgment, provided he or she has a conscience, as repentance, may treat the co-worker better as a result of the trespass.

It is also significant to note that the Grievant did not allege bias and prejudice against the Employer until Step 3, the Arbitration hearing. The Step 1 Grievance form from Mr. Mel Rodrigues to Mr. Paul G LeMahieu, Ph.d, dated September 27, 1999 (Joint Exhibit 4) provides in relevant part:

> 4. Description of Grievance:
> On September 27, 1999, the United Public Workers learned that Andrew Dhuaylonsod had not been selected for promotion to Tractor Operator. Therefore, the Department of Education violated the following Sections of the Unit 1 Agreement by not promoting Mr. Duhaylonsod.
>
> 1. Section 16.06 because the grieving party feels that he and the selectee for promotion are relatively equal in qualifications.
>
> 2. Section 16.07 because the Employer failed to devisee tests and/or examinations that directly relate to the skills, abilities and qualifications actually required for this position.

There is absolutely no reference to bias or prejudice in the Step 1 Grievance form. It is difficult for this Arbitrator to believe that the Grievant would not have made these allegations of bias and prejudice at Step 1 if he sincerely believed that same was a basis for his grievance. [6]

Mr. Albert S. Yoshii, the Employer's Superintendent's Designated Representative, by letter to Mr. Mel Rodrigues dated April 20, 2000 (Joint Exhibit 6)

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[6] Union Exhibit BB refers to four Step 1 grievance forms concerning issues regarding tests, test procedures, and seniority. Two of these grievances clearly allege bias and prejudice. For example, the Step 1 Grievance in support of grievant Sharlene Moriwaki implies prejudice and bias by stating "[s]ome concerns regarding the selection process question the objectivity of the interviewing panel (direct supervisors are utilized)…" . Likewise, the Step 1 grievance form in support of grievant Jeremy M. Hew describes the grievance in relevant art that "[t]he interview panel of three which conducted interviews on 10/9/92 included two members biased against the grievant: Automotive Supervisor Bruce Toyoshiba and his close associate Chief Jimmy Kalawa." The absence of serious allegations such as bias and prejudice at Step 1 is not fatal to Grievant's grievance, but most certainly should be a factor in determining if Grievant's supervisors were prejudiced against Grievant.

responded to the Step 1 Grievance in relevant part as follows:

> Dear Mr. Rodrigues:
>
> Re: Step 1 Grievance Filed on Behalf of Andrew Duhaylonsod, Power Mower Operator, Office of Business Services, Operations and Maintenance Section
>
> This decision is being rendered in accordance with Section 15, Grievance Procedure, of the Unit 1 Collective Bargaining Agreement between the State of Hawaii and the United Public Workers (UPW), AFSCME, Local 646, AFL-CIO.
>
> The Union has alleged that the Department violated Section 16.06c – Selection and 16.07 of the Unit 1 Agreement when it failed to select the Grievant for the vacant Tractor Operator Position (Position Number 25213).
>
> Based upon the investigation conducted at the Step 1 grievance level, I find that the Department of Education (DOE) has not violated the agreement as alleged.
>
> In accordance with the First Consideration Policy, all interested qualified candidates were given the opportunity to be considered for the vacant Tractor Operator Position. Prior to the interview, all candidates were considered equal and the raking of candidates was established based on their responses during the course of the interview.
>
> The Union has asserted that the Grievant "feels that he and the selectee for promotion are relatively equal in qualifications." We do not disagree as is evidenced by the fact that both individuals were deemed qualified to compete for the vacancy.
>
> However, the relative equal provision of the Unit 1 Agreement is sequentially placed after Section 16.06b – Announcement and Interview. The placement of this language clearly denotes that upon being qualified to compete and after the interview is conducted, if the applicants are adjudged relatively equal, seniority then becomes a critical factor.
>
> The parties, in past arbitrations (See Vincente Sistoso), have established that a difference of 5% or less deems the applicants relatively equal as it pertains to Section 16 of the Unit 1 Agreement.
>
> In the subsection, the selectee scored 180 points out of a possible 216 for

a score of 83%. The Grievant scored 128 points out of a possible 216 for a score of 59%. Clearly, by the parties' own definition, the Grievant was not relatively equal to the selectee.

As to the Union's contention that the Employer failed to devise tests and/or examinations that directly relate to the skills, abilities, and qualifications actually required for this position, I find no evidence to support this claim.

Based on the foregoing, the grievance is denied and the action of the Department is hereby sustained.

Sincerely,
Albert S. Yoshii
Superintendent's Designated
Representative

No reference to bias or prejudice was made in the Employer's response to the Step 1 Grievance form. This response would also indicate that there were no verbal assertions that th4e Employer was biased or prejudiced against the Grievant. If oral or written allegations were made, they most certainly would have been addressed in Mr. Yoshiis' letter of response to Mr. Rodrigues.

Mr. Mel Rodrigues subsequently filed a Step 2 Grievance Appeal Letter (Joint Exhibit 7) addressed to Mr. Michael McCartney – DHRD, dated April 26, 2000 which indicates that the Union decided to appeal on the following grounds: "[t]he step decision is unsatisfactory because it fails to resolve the grievance. Once again, no mention was made to any alleged prejudice or bias on the part of the Employer.

On January 2, 2001 Mr. Davis K. Yogi responded to the Step 2 Grievance Appeal Letter (Joint Exhibit 8) by letter to Mr. Mel Rodrigues. It provides in relevant part:

Dear Mr. Rodrigues:

Re: Step 1 Grievance Filed on Behalf of Andrew Duhaylonsod, Power Mower Operator, Office of Business Services, Operations and

Maintenance Section.

This Step 2 appeal concerns Grievant's non-selection for a vacant Tractor Operator position number 25213, Office of Business SVCS – O & M, Leeward/Central Crew.

The Union alleges violation of Section 16.06c. Selection, and 16.07 of the Unit 1 Agreement. The Step 1 grievance alleges the Employer violated Section 16.06c because the "Grieving party feels that he and the selectee for promotion are relatively equal in qualifications and because the Employer failed to devise tests and/or examinations that directly relate to the skills, abilities, and qualifications actually required for this position." The remedy sought is for the Employer to comply with the Unit 1 Agreement and retroactively promote the Grievant to the Tractor Operator Position.

We reviewed this grievance and found the following:

- The testing instrument utilized in this selection process evaluated each applicant's knowledge, skills, and abilities for this position. Essential knowledge, skills, and abilities for this position include the ability to operate a tractor, ability to maintain a tractor by caring for and making minor repairs to the machine and knowledge of how to cut grass and/or lawns properly and efficiently.

- Other knowledge, skills, and abilities included the ability to deal with faculty and effectively with others, knowledge of occupational hazards and safety precautions applicable to this job and the ability to read, write and understand oral and written instructions.

- There were five applicants for this position, including the Grievant.

- Though the Grievant did well in this selection process, his score was significantly below that of the Selectee.

- The Selectee's total score and Grievant's total score were not relatively equal; therefore, seniority was not a consideration in this selection process. There was no violation of Section 16.06c. Additionally, as previously stated, the testing instrument utilized in this selection process evaluated each applicant's knowledge, skills and abilities for this position.

In view of the foregoing, we find no violation of the Unit 1 Agreement.

We deny this grievance and the remedy sought.

Sincerely,

Davis K. Yogi
Director

Mr. Davis K. Yogi's response also makes no reference whatsoever to allegations Of alleged prejudice or bias on the part of the Employer. Evidently, the Union never Alleged that the Grievant had been the victim of prejudice or bias at Steps 1 and 2. Nor did the Employer ever address these issues in its responses at Steps 1 and 2 as they apparently were never raised by the Union.

It is also significant to note that after 3 ½ days of testimony from various witnesses for the Employer and the Union, not one person, including the Grievant, testified that allegations of prejudice and bias were made, direct or indirect, oral or written, prior to Step 3. Still, given the importance of such issues and allegations, this Arbitrator will not find that this argument has been waived by the Grievant. Prejudice and bias violate public policy and if such facts are true, manifest injustice would occur if an Arbitrator dismissed such allegation without hearing the merits. However, the untimely assertion of such allegation most certainly will a substantial and contributing factor as to whether this Arbitrator finds that the Grievant sincerely believed that he was the victim of prejudice or bias, or decided to make these untimely allegation to strengthen his case at Step 3, the Arbitration hearing.

The record indicates that both Mr. Oka and Mr. Sagon were not prejudiced against the Grievant because of the following combination of facts:

1. A written grievance is for all practical purposes a complaint that a party

has violated the CBA. It puts the parties on notice as to what the issues they in good faith will attempt to settle before proceeding with Step 3, the arbitration hearing. The Grievant did not grieve prejudice or bias, written or oral, directly or by inference, against Mr. Patrick Oka and Mr. Arthur Sagon, or the Employer at Steps 1 or 2. (Joint Exhibits 5 and 7).[7] Given the most liberal standard of notice pleading for administrative hearings, Perry v. Planning Commission of Hawaii County, 619 P.2d 95, 62 Haw. 666 (1980) there is an absolute and complete absence of any allegation of prejudice or bias. In addition, after the completion of 3 ½ days of testimony concerning this matter, not one witness, including the Grievant, testified that allegations of bias and prejudice were made by the Grievant prior to Step 3. Since allegations of prejudice and bias do not appear to have been discussed at Step 1 or Step 2, this Arbitrator finds it difficult to believe that the Grievant sincerely believed that Mr. Oka and Mr. Sagon were prejudiced and biased against Grievant and would use the Examination Instrument to exercise such unjust intentions.

2. There is no concrete proof of bias or prejudice exhibited by Mr. Oka and Mr. Sagon against the Grievant. For example, the Union presented no witnesses, correspondence, e-mails, or other documentary evidence to verify the allegations of the Grievant or to establish facts that the Grievant's supervisors were biased and prejudiced against him. Nor was the Union able to produce any oral or written admissions of wrongdoing by Mr. Oka and Mr. Sagon against the Grievant. Other evidence of prejudice and bias evidently does not exist, i.e., harassment of the Grievant by Mr. Oka and Mr. Sagon, disciplinary action against Mr. Oka and Mr. Sagon for actions taken against the Grievant, statements made by Mr. Oka and Mr. Sagon to co-workers evidencing bias or prejudice, assignments of demeaning work outside of the Grievant's job description, disparate treatment of the Grievant, or evidence of favoritism toward the Selectee.

3. The telephone incident between Mr. Oka and the Grievant as well as the incident between Mr. Sagon and the Grievant regarding the use of the word "stupid" appear to be isolated incidents and most certainly not patterns of vindictiveness, harassment, bias or prejudice. These incidents

[7] The function of judicial pleadings is to give opposing parties fair notice of what the claim is and the ground on which it rests. Kohala Agriculture v. Deloitte & Touche, 865 Haw. 301, 949 P.2d 14 (1997). The same if not a more lenient standard governs administrative pleadings. Perry v. Planning Commission of Hawaii County, 62 Haw. 666, 619, P.2d 95 (1980). It is the substance of the pleading that controls, not its nomenclature. Anderson v. Oceanic Properties, Inc., 3 Haw. App. 350, 650 P.2d 612 (1982). Each averment in a pleading must be simple, concise, and direct so that pleadings are construed liberally and not technically. Island Holiday, Inc. v. Fitzgerald, 58 Haw. 552, 574 P.2d 884 (1978). While pleadings must be liberally construed, it is the responsibility of the pleader to provide understandable allegations enabling the trial court or appellate court to determine whether there is any theory which might entitle the pleader to relief. Mendes v. Heirs and/or Devisees of Kealaki, 81 Haw. 165, 914 P.2d 558 (1996). For notice pleading concerning breach of contract cases, See Ontani v. State Farm Fire & Gas Co., 927 F. Supp. 1330 (D.C. Hawaii 1996); Ho v. State Farm Mut. Auto. Ins. Co., 926 F.Supp. 964, reversed in part 117 F.3d 1425 (D.C. Hawaii 1996); Pang See & Co. v. Aloha Motors, Limited, 33 Haw. 861 (1936); Davis v. King, 16 Haw. 792 (1905).

are insufficient in and of themselves to constitute prejudice and bias.

4. Mr. Oka evidently spoke to Mr. Sagon regarding the use of the word "stupid" to the Grievant. Mr. Oka would not have spoken to Mr. Sagon regarding this matter is Mr. Oka held some sort of dislike or grudge against the Grievant.

6. Mr. Oka voluntarily and sincerely apologized to Grievant for their misunderstanding (Tr. 729-730). As noted above, it is unclear from the record if the apology was for using the "F" word in reference to the favor or for the incident in general for ever occurring, or for some other reason. Mr. Oka's testimony on this issue appeared to be honest, sincere and genuine. It is unclear from the record is an apology was also in order from the Grievant for his use of profanity when speaking to the staff of Mr. Oka. As Mr. Oka testified, his staff was afraid of the Grievant because of the language that he used when addressing them.

7. Mr. Sagon testified that from a performance perspective (maintenance and actual grass cutting) the Grievant kept his machine cleaner and better than anyone else and cut grass maybe a little better than the Selectee. (Tr. at 70-17). If Mr. Sagon was biased and prejudiced against the Grievant, he most certainly would not have made these complimentary remarks.

8. Of the three interview panel members, Mr. Oka gave the Grievant the highest test score, 46, while Mr. Tanaka, the person who was not alleged to have been biased against the Grievant and Mr. Saon, allegedly biased, both gave the Grievant 41 points. The scores awarded to Grievant by Mr. Oka and Mr. Sagon are not considerably different and lower that the score give by Mr. Tanaka so as to raise concern of bias or prejudice with this Arbitrator. (Employer's Exhibit C).

9. All three interview examination panel members scored the Selectee substantially higher than the Grievant.

10. The record clearly indicates that the Grievant is a union steward who is responsible for enforcing the CBA. In light of this fact, this Arbitrator was very cautious in reviewing the facts as union stewards, in their capacity as advocates for their constituents may sometimes be targeted by an Employer. However, there is absolutely no evidence in the record that indicates that the Employer was biased or prejudiced against the Grievant because of the Grievant's position as a union steward.

11. As noted above, a charge of bias or discrimination cannot rest upon surmise, inference or conjecture, but requires clear proof. UPW v. State of

> Hawaii, Department Health (Grievance of J. Keliikuki, III) (Najita, 1991).
> The burden of proving discrimination and prejudice is with the Grievant.
> The Grievant has not shown clear proof that Mr. Oka and Mr. Sagon were prejudiced and biased against him. To the contrary, the evidence indicates that the were not prejudiced or biased and treated Grievant fairly.

Mr. Patrick Oka, Mr. Arthur Sagon, and the Grievant all appeared to be honest individuals who made good witnesses. This Arbitrator believes that each of these good men genuinely believes in the veracity and truthfulness of their respective testimony. Accordingly, this Arbitrator believes that any problems regarding the Grievant and Mr. Oka and Mr. Sagon are the result of miscommunication, not bias and prejudice. This Arbitrator also finds that Mr. Oka and Mr. Sagon fairly administered the Examination Instrument.

## IX. ARE THE JOB QUALIFICATIONS OF THE GRIEVANT AND THE SELECTEE RELATIVELY EQUAL UNDER SECTION 16.06c OF THE CBA, THUS MAKING SENIORITY THE DECIDNG FACTOR AS TO WHO SHOULD BE AWARDED THE POSITION OF TRACTOR OPERATOR?

The Selectee received the highest score of (180 points out of a possible 216 for a score of 83%. The Grievant received the second highest score of 128 points out of a possible 216 points for a score of 59%. This is a difference of 25%. Despite this significant difference in scores, the Union contends that the Employer violated Section 16.06c of the CGA when it promoted the Selectee over the Grievant (the latter being the most senior applicant of the two), to the position of tractor operator. Section 16.06c of the CBA provides in pertinent parts:

> When the qualifications between the applicants are relatively equal, the Employer shall use the following order of priority to determine which applicant will receive the promotion:

1. The qualified applicant with the greatest length of Baseyard/Workplace or Institutional/Workplace Seniority in the Baseyard/Workplace or Institutional Workplace where the vacancy exists [emphasis added].

Under Section 16.06c, seniority becomes the deciding factor in a given case, only when there is funding that the applicants are relatively equal. The threshold question under Section 16.06c, therefore, is whether the qualifications between the Grievant and the Selectee are relatively equal. [8]

In the Arbitration Decision and Award issued in UPW v. State of Hawaii Department of Education (Grievance of Vicente Sistoso) (Kim, 1997), Arbitrator Michael T. I. Kim found on the testimony of witnesses, representation of counsel, and findings of past arbitration decisions that there is a "general working recognition of the 5% rule as synonymous with the term "relatively equal." (Employer's Exhibit 15). Clarifying his understanding of this rule, by stating that any applicant scoring within a range of five percent in comparison with other applicants would be deemed "relatively equal," he found the five percent rule to be reasonable and used it in deciding the grievance presented to him. Id. at page 3. Arbitrator Kim also found that a determination between the Selectee and the Grievant that the scores are "relatively equal" is a prerequisite to the application of seniority factors in Section 16.06c(1) of the contract. He specifically

[8] The Grievant cited several Hawaii Arbitration cases that support the Grievant's position that his grievance should be sustained. However, there cases are distinguishable from the case before this Arbitrator. United Public Workers v. County of Maui Department of Water Supply, Grievance of Arnold Torres) (Hunter, 2001) is not applicable because the test instrument did not provide for standardized model responses to a majority of the questions, thus allowing too much subjectivity on the part of interviewers scoring the exam. In addition, interviewers were allowed to score a response with an award of 0 to 4 points without knowing what the preferred response was to certain questions. United previous arbitral decisions, the "relatively equal" language in Section 16.06c of the Unit 1 contract has been most closely identified as a "relative ability seniority clause" as opposed to a "strict seniority," "sufficient ability" or hybrid seniority clause." HGEA v. County of Maui, Department of Public Works (Grievance of Sardinha) (Tsukiyama, 1983) and Department of Health v. HGEA (Grievance of Cynthia Kawada( (Tsukiyama, 1986). The "relative ability" seniority clause provides that seniority shall govern if the comparative ability or qualifications of the applicants are "relatively equal" or "equal" or where "no ability or qualifications of the applicants exists." As noted herein at footnote 1, the relative ability clause is the weakest form of seniority clauses. According to the May 1998 directive issued to all state departments by James Takushi, former Director of the Department of Human Resources, all departments were directed to utilize five percent as the standard for assessing whether candidates are "relatively equal" in order to determine whether seniority would prevail in final selections for non-competitive matters. (Employer's Exhibit 4).

found that, "without the initial qualification that the Grievant is relatively equal, the consideration and application of any and all aspects of seniority is inappropriate." Id. at page 4: Also see Elkoura, supra, at page 838 (in determining the issue of relative equality, comparisons between qualifications of employees bidding for the job are necessary and proper and seniority becomes a factor only if the qualifications are equal). Arbitrator Kim's reasoning is consistent with the Employer's longstanding statewide interpretation of the term "relatively equal" and its application to Section 16.06c(1). [9] Employer's Exhibit 4). Other arbitral decisions in the State of Hawaii recognizing this five percent standard are State of Hawaii, Department of Industrial Relations v. Hawaii Government Associaton, (Grievance of John Stein) (Yamasaki, 1990); Selectee 7% higher than Grievant); State of Hawaii, Department of Helalth v. Hawaii Government Employees Association, (Grievance of Cynthia Kawada) (Tsukiyama, 1986) (Selectee 8.4% higher than Grievant); and Hawaii Government Employees Association v. Harbor Department of Transportation, State of Hawaii, (Grievance of Randal H. W. Leong (Kennedy, 2000) (Selectee 9% higher than Grievant). [10] See also Elkouri, supra, at 839 (although exact equality is not necessary,

[9] According to the May 1998 directive issued to all state departments by James Takushi, former Director of the Department of Human Resources, all departments wee directed to utilize five percent as the standard for assessing whether candidates are "relatively equal" in order to determine whether seniority would prevail in final selections for non-competitive matters. (Employer's Exhibit 4).

[10] The Grievant cited several Hawaii Arbitration cases that support the Grievant's position that his grievance should be sustained. However, these cases are distinguishable from the case before this Arbitrator. United Public Workers v. County of Maui, Department of Water Supply, Grievance of Arnold Torres) (Hunter, 2001) is not applicable because the test instrument did not provide for standardized model responses to a majority of the questions thus allowing too much subjectivity on the part of interviewers scoring the exam. In addition, interviewers were allow3ed to score a response with an award of 0 to 4 points without knowing what the preferred response was to certain questions. United Public Workers v. County of Maui, Department of Public Works and Waster Management, (Grievance of Simeon Park) (Kam, 1998) is not applicable because the test instrument tested the applicants communication skills and personality traits that were not directly related to the ability to operate a tractor mower. The interviewers also did not take into account temporary assignments or relevant work experience. Lastly, United Public Workers v. Department of Public Works, County of Maui, (Grievance of Robert Fuller) (Uysato, 1993) is not applicable since one of five categories the test instrument evaluated was sick leave usage, which was unrelated to the applicants skills, abilities and qualifications for the position of Lead Wastewater Plant Maintenance Mechanic. In addition, the failure to consider supervisory training, technical training and temporary assignment were reasons for invalidating the test instrument. **Here the Union has been estopped from attacking the**

"an approximate or near equality of competing employees' is necessary in order to bring the seniority factor into play. Also see Wolf Creed Nuclear Operating Corporation and International Brotherhood of Electrical Workers, Local 304, 111 LA 801 (Erb, 1998) (Selectee on average 25% higher than Grievant). The Union has consistently denied that this 5% rule should apply in determining is two competing employees are "relatively equal." [11]

This Arbitrator believes that this 5% rule should be used as a general rule, but that an Arbitrator should also look at the totality of circumstances before determining if two applicants are "relatively equal." For example, the way a test has been devised (in this case the Union is estopped from attacking the test instrument) is very important. The test must also be administered by qualified individuals who administer the test fairly and objectively. Reliance only on percentages is an excellent starting point. Reliance only on percentages, which would only constitute naked statistics can create injustice and inequity.

Accordingly, given the fact that there was a 24% difference between the Selectee's score (83%) and the Grievant's score (59%), the fact that all three panel members scored the Selectee substantially higher than the Grievant, the fact that the

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**Examination Instrument. Therefore, the Examination Instrument is presumed to be valid. In any event, the defects in the above-cited cases are not present in the Test Instrument before this Arbitrator. Irrespective of this conclusion, the Examination Instrument must still be administered fairly and without bias and prejudice.**

[11] The Union asserted that the Employer had deviated from the 5% (Employer Exhibit 4) standard for assessing whether candidates are "relatively equal." (Tr. 671). The Union further asserted that at times, the Employer had used a standard of 8%, 10%, and even 18%. (Tr. 671). The Union was given the opportunity to provide information to support this claim. (Tr. 671-679). The Union provided the information in Union Exhibit BB. It consists of 4 grievances that were evidently settled. The Union asserts that in each of these cases, the grievants possibly scored between 8%, 10%, and 18% lower than the Selectee. A review of this evidence does not establish that the Employer had deviated from Employer's Exhibit 4 and the 5% rule. However, assuming arguendo that this assertion was correct and this Arbitrator used an 18% standard rather than a 5% standard to determine if the Grievant and the Selectee were relatively equal, given the Selectee's score of 83% and the Griveant's score of 59%, the Selectee would still be superior o the Grievant and seniority still would not become a critical factor. If is also significant to note that the cases produced by the Union were settled matters. This Arbitrator is not privy to the reasons why they were settled.

Union is estopped from attacking the Examination Instrument as being unrelated to the skills, abilities and qualifications for the position of tractor operator, the fact that the Employer assembled an examination panel of extremely well-qualified, responsible, and experienced individuals familiar with the job requirements of the position of tractor operator, the fact that all panel members were present during the interview process and personally observed the Grievant and the Selectee, the fact that the Examination Instrument was administered fairly to all candidates, and the fact that bias and prejudice against the Grievant has not been established, this Arbitrator finds that the Selectee and the Grievant are not relatively equal and that the seniority provision of Section 16.06c does not become a critical factor in determining if the Grievant should be awarded the position that was awarded to the Selectee.

**X. CONSLUSION**.

The Employer did not violate either sections 16.06c or 16.07 of the Collective Bargaining Agreement. The Selectee and the Grievant are not relatively equal. The position of Tractor Operator was properly awarded to the Selectee.

**XI. AWARD.**

For the foregoing reasons, the grievance filed on behalf of the Grievant by the Union is denied.

DATED: Honolulu, Hawaii, August 20, 2003.

/s/
MICHAEL ANTHONY MARR
ARBITRATOR

STATE OF HAWAII )
) SS.
CITY AND COUNTY OF HONOLULU )

On this 20th day of August 2003, before me personally appeared Michael Anthony Marr, to me known tobe the person described in and who executed the foregoing “Decision and Award” and acknowledged that he executed same as his free act and deed.

**SEAL**

/S/_____
THUY LE MARR
NOTARY PUBLIC, STATE OF HAWAII
My Commission expires on: 5-2-04

BEFORE ARBITRATOR MICHAEL ANTHONY MARR, ESQ.

STATE OF HAWAII

| | | |
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| In the Matter of the Arbitration Between | ) | GRIEVANCE OF ANDREW DUYAYLONSOND |
| UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, | ) | |
| Union, | ) | CERTIFICATE OF SERVICE |
| and | ) | HEARING DATES: April 26, 2001 and December 12, 13, and 18, 2002 |
| STATE OF HAWAII, DEPARTMENT OF EDUCATION, OPERATIONS AND MAINTENANCE SECTION, LEEWARD/CENTRAL MOWING CREW, | ) | |
| Employer. | ) | |

## CERTIFICATE OF SERVICE

I, MICHAEL ANTHONY MARR, Arbitrator in the above-referenced matter, do hereby certify that a copy of the attached "Decision and Award" concerning the above-reference matter, was duly mailed, postage prepaid, to the following persons at the addresses listed below:

Wendy Matsumoto Chun
Deputy Attorney General
Department of the Attorney General
235 S. Beretania Street, 15th Floor
Honolulu, Hawaii 96813

David M. Hagino, Esq.
1481 South King Street
Suite #314
Honolulu, Hawaii 96814

DATED: Honolulu, Hawaii August 20, 2003.

S//_____
MICHAEL ANTHONY MARR
Arbitrator